



1 Tostado argues that his incarceration is in violation of the Fourth, Fifth and Fourteenth  
2 Amendments to the United States Constitution. Specifically, Valdivia-Tostado argues he is not  
3 subject to a final order of removal. Thus, Valdivia-Tostado argues he is subject to section 236(a)  
4 of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1226(a).<sup>1</sup> The United States opposes  
5 the motion arguing it is entitled to detain Valdivia-Tostado pursuant to Section 241(a)(2), 8 U.S.C.  
6 § 1231(a)(2).

7 As a threshold issue, Valdivia-Tostado’s motion is not properly before the court. In his  
8 Application for Writ of Habeas Corpus (# 1), Valdivia-Tostado asserted ineffective assistance of  
9 counsel and asked this court to order the BIA to reissue its decision and to enjoin Valdivia-  
10 Tostado’s removal. The court granted the writ and ordered the relief requested by Valdivia-  
11 Tostado. (June 11, 2008, Order (# 10).) Valdivia-Tostado’s habeas petition did not raise the issue  
12 that he was being unconstitutionally held in custody. Thus, the issue has not been properly  
13 presented to the court. *See Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994).

14 Even if the issue had been properly raised, Valdivia-Tostado has failed to demonstrate his  
15 right to relief. Valdivia-Tostado contends that “[o]nce this Court ordered the BIA to reissue its  
16 decision, Petitioner was no longer subject to a final administrative order of removal.” (Mot. to  
17 Order Release (# 11) at 4-5.) Nevertheless, this court’s June 11, 2008, Order did not address the  
18 validity of the final order of removal. This court lacks jurisdiction over final removal orders. 8  
19 U.S.C. § 1252(g). As this court’s Order did not effect the final removal order, Valdivia-Tostado’s  
20 has not demonstrated his right for relief.

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24 <sup>1</sup>In his reply points and authorities, Valdivia-Tostado asserts that the BIA has now reissued its decision.  
25 Valdivia-Tostado further asserts that he has filed an appeal and a motion for a stay of removal. The court does  
26 not consider arguments raised for the first time in a parties’ reply points and authorities. Moreover, Valdivia-  
Tostado has not shown whether the BIA will continue to hold him if a stay is issued.

1 IT IS THEREFORE ORDERED that Valdivia-Tostado's Motion to Order Release of  
2 Petitioner from Incarceration (# 11) is hereby DENIED.

3 IT IS SO ORDERED.

4 DATED this 27th day of August, 2008.

A handwritten signature in blue ink, appearing to read "L. Hicks", is written over a faint circular stamp.

7 LARRY R. HICKS  
8 UNITED STATES DISTRICT JUDGE  
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